STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
MELVIN OSBORNE and	)	
ROBERT BOUDREAUX,	)	
	)	
Complainants,	)	
	)	
and	)	CHARGE NOS: 2000SP0022
	)	2000SP0023
	)	EEOC NO:
STEVE'S OLD TIME TAP,	)	ALS NO: S-11225
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing on this consolidated matter was held before me in Peoria, Illinois on October 3, 2000. The parties waived the filing of post-hearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

In this complaint, Complainants allege that they were denied the full and equal enjoyment of Respondent's tavern when Respondent's employees told them to leave the tavern on account of their race. Respondent, however, contends that Complainants were asked to leave the tavern because Respondent's employees suspected that Complainants were using drugs and were threatening one of Respondent's employees.

Findings of Fact

1. On June 17, 1999, Complainants Robert Boudreaux and Melvin Osborne, African-Americans, went into Respondent's Steve's Old Time Tap, a tavern, to use the bathroom facilities. Both Complainants were from Burlington, Iowa and intended on getting a soda pop or something to eat before Boudreaux was to attend to some business on behalf of his wife.

2. When Complainants entered the tavern, three individuals were seated at the bar, with Sami Engholm, Respondent's Caucasian tavern manager, standing behind the bar talking to Sandra Smith. Smith, a Caucasian, was seated at the bar and worked as a legal assistant for Mark Cyr, the owner of the tavern. Smith also performed bartending duties at the tavern on certain occasions.

3. Complainants went to the end of the bar near where Smith and Engholm were located. At that time Boudreaux told Osborne that he was going to use the restroom, and that Osborne could use it after he was finished. The men's restroom, which was approximately four to six feet from where Smith was seated, had a single, unlocked door leading into an otherwise exposed toilet.

4. Boudreaux spent approximately seven minutes in the bathroom while Osborne waited outside playing a pinball machine near the restroom.

5. After Boudreaux exited the restroom, Boudreaux told Osborne to hurry up because he wanted to get something to eat. Osborne went into the restroom while Boudreaux stood near the pinball machine. Shortly thereafter David Manley, a Caucasian cook at the tavern, spoke with Engholm and then proceeded with spatula in hand from his station behind the bar to the men's restroom door.

6. When Manley got to the men's restroom, he kicked in the door and saw Osborne seated on the toilet with his pants down. Osborne stated "what's going on", and Boudreaux loudly questioned Manley as to why he kicked in the door. Manley responded: "You don't tell me what to do. I own this place and you get your Black asses out of here".

7. After Boudreaux heard this initial statement from Manley, Boudreaux responded: "O'kay that's fine, just let my friend finish using the bathroom". Both Boudreaux and Manley continued to argue loudly, with Manley stating at one point: "Whatever you're

doing, you're not going to be doing that here." Osborne eventually came out of the restroom and began arguing with Manley as to why he had barged into the restroom.

8. Eventually, Engholm told Boudreaux to "get the f--k out, or I'll call the cops". Boudreaux responded: "Cool, call the cops, I am here just to use your restroom and probably get a pop, and you're kicking us out? I'll be back." Engholm thereafter called the police. Manley then stated: "Oh, I know you'll be back. I know how your kind are." Boudreaux replied: "I'm not coming back with anyone. I'm coming back with a lawyer." Both Complainants then left the tavern.

9. After Boudreaux finished with his meeting on behalf of his wife, he urged Osborne to accompany him to the "cop shop", i.e., the police station, to inquire as to whether there had been any arrest warrants on them based upon the incident at Respondent's tavern. After finding that there had been no outstanding warrants, Complainants walked throughout downtown Rock Island looking for an attorney who would take their case. Complainants eventually spoke to Walter Braud, an African-American attorney, who spoke to Cyr about the incident. Cyr then met with Complainants on the same day and promised to investigate the matter.

10. At all times pertinent to this Complaint and beginning in April of 1999, the employees of Respondent attended certain classes relating to the operation of a tavern that were sponsored by the State of Illinois. As a result of their participation in these classes, Respondent initiated a policy requiring its employees to write down incidents in a "tips book" for times when police were called to escort unruly patrons from the premises or to investigate criminal activity. The policy further provided that Respondent's employees would not write down an incident in the tips book if patrons were asked to leave because of drug activity, drunkenness or fighting but police were not called.

11. At 2:00 p.m. on June 17, 1999, Engholm wrote about the incident with Complainants in the tips book. In her note, Engholm asserted, inter alia, that:

> "I call[ed] the police because there was [sic] 2 Black [g]uys who w[]ere in our bathroom a very long time. Dave Manley went back to the bathroom and [Osborne] was [b]ent over the stool - I assume doing drugs. They were asked to leave and they started fighting with Dave, threatening him. [Boudreaux] was sniffing and rubbing his nose…" (Emphasis in original.)

Engholm signed the note, and Manley subsequently signed the note after reviewing the text.

12. From May of 1999 through January of 2000, Respondent's employees made twenty entries in the tips book. Of these entries, five incidents concerned African-Americans, fourteen concerned Caucasians, and one concerned a Hispanic. Moreover, while Respondent's policy was to write down only those incidents in which the police were called, twelve of these calls did not result in a telephone call to the police. Of the twelve incidents in which the police were not called, eleven incidents concerned Caucasian customers, while one incident concerned a Hispanic customer. Two of these twelve incidents (i.e., May 16, 1999 and December 1, 1999) concerned situations where the customers displayed threatening behavior to the bartender and the bartender did not telephone the police.

13. From February of 2000 through September of 2000, Respondent's employees wrote twelve entries in the tips book. Nine of the twelve entries involved incidents where the police were called. The three incidents in which the police were not called concerned Caucasian patrons, and six of the nine incidents in which the police were called concerned African-American patrons. The tips book did not specify the race of the patrons in one incident in which the police were called.

14. At all times pertinent to this Complaint, Respondent employed eleven individuals as bartenders, including Manley, who also served as a cook, and Smith. All

eleven bartenders were Caucasian. During this time, Respondent also employed a maintenance person who is African-American.

15. At all times pertinent to this Complaint, Respondent had a policy of permitting individuals to come into the tavern and use the restroom even if they did not order any food or drinks from the tavern.

16. Complainant Boudreaux missed two days of work as a carpet layer as a result of attending the fact-finding conference and the public hearing. As a result, Complainant Boudreaux experienced a wage loss of $400 arising out of Respondent's discriminatory conduct.

17. Complainant Osborne missed two days of work as a machine operator as a result of attending the fact-finding conference and the public hearing. As a result, Complainant Osborne experienced a wage loss of $240 arising out of Respondent's discriminatory conduct.

Conclusions of Law

1. Complainants are individuals claiming to have been aggrieved by denial of the full and equal enjoyment of the facility and services of a public accommodation on the basis of race discrimination prohibited by the Human Rights Act, 775 ILCS 5/5-102(A).

2. Respondent is a place of public accommodation as that term is defined under the Human Rights Act, 775 ILCS 5/5-101(A)(1).

3. Complainants established a *prima facie* case of unlawful discrimination regarding Respondent's denial of the full and equal enjoyment of a public accommodation when they were directed to leave Respondent's tavern.

4. Respondent articulated legitimate, non-discriminatory reasons for its decision to direct Complainants to leave Respondent's tavern.

5. Complainants established by a preponderance of the evidence that Respondent's reasons as to why they were directed to leave Respondent's tavern were a pretext for race discrimination.

Determination

Complainants proved by a preponderance of the evidence that they were discriminated against on account of their race when they were directed to leave Respondent's tavern.

Discussion

The heart of this case concerns the question of whether Respondent's employees violated the Human Rights Act when they directed Complainants to leave Respondent's tavern while Complainants were using its restroom facilities. The Human Rights Act provides that it is a civil rights violation for an individual to be denied the full and equal enjoyment of the facilities and services of a public accommodation on the basis of unlawful discrimination. (See, 775 ILCS 5/5-102(A).) Moreover, unlawful discrimination under the Human Rights Act includes discrimination on the basis of race. See, 775 ILCS 5/1-103(Q).

Generally, there are two ways in which a complainant may establish a *prima facie* case of discrimination under the Human Rights Act. In **Belha v. Modform, Inc.**. ___ Ill. HRC Rep. ___ (1987CF2953, January 31, 1995), the Commission observed that a *prima facie* case of discrimination could be established through either direct or indirect evidence of discrimination. For example, where there is no direct expression of discriminatory animosity by the decision-maker, a complainant can still make out a *prima facie* case of discrimination through proof that certain factors associated with the adverse act were taken under circumstances suggesting a discriminatory purpose. These factors, though, are effective in creating an inference of discrimination only if they tend to prove a *prima facie* case of discrimination by eliminating legitimate, non-discriminatory reasons for the adverse

act. **Belha**, slip op. at p. 5, citing **Furnco Construction Co. v. Waters**, 438 U.S. 567 (1978).

Complainants on the other hand used the direct method at establishing a *prima facie* case of race discrimination, which requires evidence such as discriminatory remarks that demonstrate a linkage between the adverse act and the decision-maker's alleged discriminatory animosity. (See, for example, **Robin v. Espo Engineering Corp.**, 200 F.3d 1081, 1089 (7th Cir. 2000).) In this respect, temporal proximity of the subject remark to the adverse act is often crucial when establishing a *prima facie* case of discrimination based on direct evidence. Here, Complainants cite as direct evidence of race discrimination Manley's order telling them to get their "Black asses" out of the tavern. In this regard, I agree with Complainants that Manley's comment constituted direct evidence of discrimination since Manley's racial comment, uttered in near proximity to his order telling Complainants to leave the tavern, created an inference that race was the motivation behind his order to have Complainants leave the tavern.

At the public hearing, Respondent did not quarrel with the concept that Manley's remark can constitute direct evidence of racial discrimination, but rather contended that Manley did not utter this remark or kick in the restroom door as alleged by both Complainants. However, both Complainants appeared to be more credible on these factual disputes given their demeanor on the witness stand and the inconsistencies in Engholm's testimony mentioned below. More important, though, Complainants' version of the facts was more consistent with a finding that Manley uttered a racial remark and kicked in the bathroom door since: (1) Complainants and Engholm agree that a heated exchange arose among Complainants and Respondent's personnel after Manley had entered the restroom; and (2) the encounter entailed Complainants and Manley shouting and swearing at each other and Engholm ultimately telling Complainants to "get the f--k out" of the

tavern. Under these circumstances, I agree with Complainants that they have established a *prima facie* case of race discrimination.

However, as noted by the Commission in **Belha**, if, after a complainant has established a *prima facie* case of discrimination through the use of direct evidence, a respondent articulates a legitimate reason for the adverse act, a complainant is still required to show that the articulated reason is a pretext for discrimination. This is so, the Commission in **Belha** reasoned, since, although the discriminatory remark constitutes strong evidence of discrimination, there remains a possibility that the declarant enforced the adverse act without considering the prohibited characteristic. (**Belha**, slip op. at p. 9.) Here, Respondent's employees gave two reasons for telling Complainants to leave the tavern: (1) Complainants were yelling and swearing at Manley and were otherwise disruptive to Respondent's employees and patrons in the tavern; and (2) Respondent's employees believed that Complainants were conducting drug activities while using the restroom. These explanations, if believable, provide me with neutral, non-discriminatory explanations for the decision to seek Complainants' removal from the tavern. Thus, it was incumbent on Complainants to show that Manley's racial animosity, as opposed to their own conduct, was the reason why they were directed to leave Respondent's tavern.

Purported Drug Activity.

During the public hearing, Engholm testified that in the past Respondent's tavern had experienced a serious problem with individuals using/selling drugs in the tavern, and that she and Manley had grown suspicious that Complainants were using drugs in the restroom. She based her suspicions on the fact that: (1) Complainant Boudreaux spent approximately ten minutes in the restroom; and (2) Complainant Boudreaux rubbed his nose after coming out of the restroom and told Complainant Osborne to hurry up and use the restroom. Engholm also wrote in Respondent's tips book that after Manley went into the restroom,

she saw Osborne bent over the stool in such a manner so as to give her the impression that he was doing drugs. A close review of the record, though, does not support Engholm's claims in this regard.

Specifically, outside of the incident involving Complainants in June of 1999, the record contains very little evidence demonstrating that Respondent's patrons used or sold drugs within the tavern. Indeed, Respondent's tip book reveals only one other incident subsequent to August of 1998 that pertained to allegations of drug activity. That incident, which occurred on August 31, 2000, concerned two African-American males who were accused by another patron of attempting to sell drugs within the tavern. While Respondent's employees called the police to investigate the claims made by the patron, the August 2000 incident is arguably different in nature from the incident at bar since Boudreaux's nose rubbing did not present Engholm with an obvious sign of drug activity.[1] Moreover, I agree with Complainant Boudreaux that Respondent's restroom was an unlikely place for drug activity because there were no locks on the restroom door, and there was no area within the restroom capable of shielding a drug activity from members of the general public who could have entered the restroom at any time.

True enough, Engholm provided details in her tips note that supported her assertion that she believed that Complainants were doing drugs in the restroom. This evidence, though, is subject to doubt since Engholm never claimed in her testimony that she actually saw Complainant Osborne in the restroom and never disputed Complainant Osborne's testimony that he was merely sitting on the stool when Manley entered into the restroom. Additionally, even if Manley and Engholm had initially believed that Complainants were

[1] Engholm testified that Caucasian customers had been "kicked out" of the tavern for drug use. The tip notes provided by Respondent, though, do not support her contention, and the February 10, 2000 incident brought up by Engholm in this regard merely reflects that two Caucasian customers were asked to leave because they were throwing peanuts behind the bar.

doing drugs in the restroom, that belief was gone by the time Manley discovered that Complainant Osborne was sitting on the toilet. Indeed, if Manley actually thought that Complainants had been doing drugs in the restroom he could have said so when Complainants had asked him on various occasions why he needed to kick in the door to the restroom. Instead, Manley replied: "whatever you're doing, you're not going to be doing that here". Under these circumstances, I find that any concerns about drug use could not have been a basis for Manley's order directing Complainants to leave the tavern.

Disruptive conduct.

Engholm's alternative rationale for seeking Complainants' removal, i.e., that both Complainants were screaming and cussing at Manley and others, has more support in this record. Specifically, Engholm testified that a loud argument arose after Manley entered the restroom and indicated in her tip note that at one point during the confrontation she told Boudreaux to "get the f--k out or I'll call the cops". Complainant Boudreaux's testimony also suggested that the confrontation was heated in nature since he observed that both he and Complainant Osborne were "freaking out" over the fact that Manley had barged into the restroom. In this respect, not only does Engholm's rationale provide me with a race neutral reason for Complainants' removal from the tavern, but I would note that Complainants did not present any evidence at the public hearing which would dispute a tavern-owner's ability to remove disruptive patrons from its tavern.

However, Respondent's argument in this regard ignores the context in which the Complainants' actions were made. Specifically, it is important to note that any screaming or swearing on the part of Complainants and Manley took place only after Manley had barged into the restroom and told Complainants to get their "Black asses" out of the tavern. The Commission considered a related issue in **Coleman and Cracker Barrel Old Country Buffet**, ___ Ill. HRC Rep. ___ (1990SF0061, May 5, 1997), where the complainant had

argued that she had been terminated on the basis of her race. There, the respondent asserted that the complainant was terminated for insubordination after she had told her supervisor: "You ain't my daddy and you ain't gonna tell me what to do." In finding in favor of complainant, the Commission found that the complainant's insubordination was the inevitable consequence of respondent's discriminatory treatment of her where the record showed that: (1) prior to complainant's outburst, respondent had subjected complainant to disparate treatment; and (2) the supervisor had responded with anger when complainant questioned his discriminatory treatment of her. Slip op. at p. 19.

A similar finding is appropriate here. Specifically, the record shows that Complainants were not disruptive in the tavern until after Manley had barged into the restroom and found Complainant Osborne merely sitting on the stool. Even giving Manley and Engholm the benefit of the doubt as to their initial suspicions that Complainants had been doing drugs in the restroom, Manley could not have harbored those thoughts once he observed Complainant Osborne sitting on the stool. Moreover, when Complainants questioned Manley as to why he had barged into the restroom, Manley, instead of apologizing for his actions or informing them of his initial suspicion, directed Complainants to get their "Black asses" out of the tavern. In this sense, where Respondent's employees initiated the confrontation and then exacerbated the situation by uttering a racial epithet, I find that Complainants' verbal outbursts challenging Manley's conduct were the inevitable consequences of discriminatory behavior on the part of Respondent's employees. As such, I find that Respondent cannot rely on Complainants' disruptive conduct as a race neutral reason for directing them to leave its tavern.

Two matters warrant some discussion before leaving the liability portion of this order. First, Engholm and Smith, in testifying with respect to their participation in the "tips" training, suggested that Complainants were treated similarly to other disruptive patrons of

the tavern as reflected in the tips notes. However, a closed reading of the tips notes indicates that the bartenders were given a significant amount of discretion in deciding how individuals would be asked to leave the tavern and whether the police would be called to remove unruly patrons. Moreover, while Engholm insisted that Respondent's employees were only following policy in writing down an incident and calling the police, the record shows the existence of many instances in which this aspect of the policy was not followed where an incident was written down but the police were not called. Indeed, the tips book reveals a December 1, 1999 incident in which the police were not called even though three male Caucasian patrons threatened a female bartender with physical violence. Such examples of inconsistencies do little to support Respondent's claim that Complainants received even-handed treatment in being directed to leave the tavern.

The second matter concerns Respondent's presentation of statistics regarding the racial make-up of its workforce as a means to support its claim that something other than race was the driving force for Manley's actions in ordering Complainants to leave the tavern. In this regard, Respondent noted that while at the time of the incident all eleven bartenders were Caucasians, one African-American had been serving as the tavern's maintenance man for a period of four years prior to the incident. These statistics, however, do not provide any insight into Manley's motives *vis a vis* Complainants' removal from the tavern, and I would note that the record was silent as to who was responsible for the hiring of Respondent's employees. Moreover, Respondent's placement of its only African-American employee into a position that did not have any apparent role in the decision to remove patrons does not particularly advance any suggestion by Respondent that it was particularly sensitive to African-American patrons or job applicants. In any event, the outcome of this case did not depend on the racial make-up of Respondent's employees. Rather, Complainants prevailed in this matter because they showed through Manley's

actions and words that race was the motivation for Respondent's removal of them from its tavern.

In assessing damages, I note that neither Complainant asserted any emotional damages arising out of the subject incident. However, both Complainants argued that they are entitled to lost wages over a period of two days because they attended the fact-finding conference and the public hearing. In this regard, Complainant Boudreaux asserted that, as a carpet layer, he would have earned between $300 and $500 for the two-day period. Under this record, I find $400 to be a reasonable amount of damages for Complainant Boudreaux. Similarly, Complainant Osborne indicated that he made $120 per day as a machine operator, and that he too missed two days of work to attend the required hearings. Accordingly, I find that Complainant Osborne incurred $240 in damages as a result of Respondent's discriminatory conduct. Neither Complainant hired an attorney, so there will be no award for attorney fees. Similarly, Complainants have not asserted any claim for costs, so none will be awarded.

IT IS THEREFORE RECOMMENDED that:

1. The Complaints in this matter be sustained.
2. Respondent pay to Complainant Boudreaux the sum of $400.
3. Respondent pay to Complainant Osborne the sum of $240.
4. Respondent cease and desist from discriminating against persons on the basis of race.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 20TH DAY OF MARCH, 2001